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IN THE

Supreme Court of the United States

October Term, 1954

No. 508

SOUTHERN BAKERS ASSOCIATION, INC., and
ATLANTA BAKING COMPANY, INC.,
Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

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Dated: January 3, 1955.

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The Opinion Below

The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division (three judges sitting, pursuant to 28 U. S. C. 2325), is reported at 124 F. Supp. 600-605. A copy of that opinion and the District Court's order denying the petition for rehearing and motion to alter and amend judgment of Southern Bakers Association, Inc. and Atlanta Baking Company, Inc. (hereinafter called "appellants") are appended hereto (see pp. 13 to 23, *infra*).

The Grounds on Which Jurisdiction Is Invoked

i) *The Nature of the Proceeding*

This action was instituted by appellants in the United States District Court for the Northern District of Georgia by petition to suspend, enjoin, annul and set aside (in part) an order of the Interstate Commerce Commission (hereinafter referred to as the "Commission") pursuant to United States Code, Title 28, Sections 1336 and 2321-2325.

ii) *The Judgment Appealed From*

The appeal herein is taken to review the judgment and order of August 16, 1954 of the United States District Court for the Northern District of Georgia denying the relief sought by appellants and the order of that Court of September 7, 1954 denying appellants' petition for rehearing and motion to alter and amend the judgment of August 16, 1954.

Appellants' Notice of Appeal was filed in the United States District Court for the Northern District of Georgia on November 5, 1954.

iii) *The Statute and Cases Believed to Confer Jurisdiction*

The Supreme Court of the United States has jurisdiction of this appeal under United States Code, Title 28, Section 1253. Pursuant to that statute, the Supreme Court has assumed jurisdiction of scores of similar appeals (see, for example, *Secretary of Agriculture* v. *U. S.*, 347 U. S. 645 (1954)).

Question Presented by the Appeal

Upon careful consideration, appellants present to this Court only one question upon this appeal, as follows:

Did the Commission's failure to publish notice of the rate- (rule-) making proceedings before it in the Federal

Register, pursuant to Section 4(a) of the Administrative Procedure Act (5 U. S. C. 1003(a)), illegally deny appellants and other consumer and consignee interests legally-required notice of the proceedings and opportunity to be represented in such rate- (rule-) making proceedings in which they had a vital pecuniary interest and render the proceedings before the Commission null and void?

Statement of the Case

The proceeding before the Commission (*State Corporation Commission of Kansas* v. *Atchison, Topeka and Santa Fe Railway Company et al.*, ICC Docket 29777, 289 ICC 553 (1953)) was initiated by complaint of the State Corporation of Kansas, alleging, among other things, that railroad freight rates on grain and grain products in carload lots from origins in Oklahoma and Texas were unduly preferential to producers and shippers in Oklahoma and Texas and unduly prejudicial to Kansas in violation of Section 3 of the Interstate Commerce Act (49 U. S. C. 3). The Kansas complaint was heard before Examiners of the Commission and the Commission's decision and order, prescribing the rate increases complained of by appellants, was issued June 5, 1953 but has not yet become effective.

The Commission published no notice of the proceedings before it in the Federal Register, an action which appellants claim was required by Section 4 (a) of the Administrative Procedure Act (5 U. S. C. 1003 (a)). Appellants had no notice of the proceedings before the Commission prior to the Commission's June 5, 1953 decision. After that decision, in September, 1953, Southern Bakers filed with the Commission a petition for reconsideration, rehearing, and reargument. That petition, along with others, was denied by the Commission and thereafter appellants petitioned the District Court to suspend, enjoin, annul and set aside (in part) the decision and order of the Commission. The decision and order of the Commission, which was the sub-

ject of appellants' attack, found unlawful preference and prejudice to exist and required western railroads to increase freight rates on grain and grain products from origin points in southern Kansas, Oklahoma and northern Texas to points in the South. Appellants sought review of that portion of the order prescribing such increases.

In the District Court, appellants urged the invalidity of the Commission's decision and order by reason of its failure to publish notice of the proceedings before it in the Federal Register. The District Court rejected appellants' contention, saying (124 F. Supp. 600 at p. 604):

> "Under the facts in this case, where the relief sought by the complaint was an order directed against the defendant rail carriers who were served and answered, and against no one else, Sec. 4(a) of the Administrative Procedure Act does not require the publication of notice, since this proceeding comes within the exception to the provision.[11] Consignees and consumers are not directly subject to the order, and in its indirect effect upon them, their interests were sufficiently represented by the Commission itself, a public agency created by Congress."

"11. Sec. 4 (a) 'Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law * * *'"

Appellants, who directly or indirectly, must pay any increased freight rates prescribed by the Commission, maintain that the above ruling of the District Court was erroneous, and therefore prosecute this appeal.

The Question Presented Is Substantial

The real question here is whether the action, and practice, of the Commission in fixing freight rates affecting millions of people without general public notice will be condoned.

Section 4 (a) of the Administrative Procedure Act (5 U. S. C. 1003 (a)) provides in pertinent part as follows:

> "NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) . . ."

In considering the importance of the question here involved, it should be remembered that the Commission exercised its power under Section 15 (1) of the Interstate Commerce Act (49 U. S. C. 15 (1)) to prescribe, after hearings, the rates to be charged by carriers in, and pursuant to, their tariffs (see 49 U. S. C. §§6 (1), 6 (7)).

The Commission here actually *prescribed rates in the form of amended carrier tariffs.* It made findings as to what the supposedly lawful rates should be. It ordered the so-called defendant carriers to amend their *tariffs* to put into effect the *increased rates so prescribed.* The *increased rates, the amended tariffs,* were the end product of the Commission's rule making. Its order to the carriers to put such rates into effect was merely the implementation of its rule-making conclusions. That order equally required shippers, consignees and consumers to pay the increased rates.

Tariffs are binding upon carriers and the public (shippers, consignees and consumers) alike as a matter of law, as this Court has frequently held.

Boston & Maine R. R. v. *Hooker,* 233 U. S. 97 (1913);

Louisville & N. R. R. Co. v. *Maxwell,* 237 U. S. 94 (1915);

Southern Ry. Co. v. *Prescott,* 240 U. S. 632 (1916);

Western Un. Tel. Co. v. *Esteve Bros. & Co.,* 256 U. S. 566 (1921);

Louisville & N. R. R. v. *Central Iron Co.*, 265 U. S. 59, 65 (1924);
Lowden v. *Simonds Etc. Grain Co.*, 306 U. S. 516 (1939).

Therefore, to say as did the District Court, that the Commission's prescription of rates and tariffs involved "an order directed against the defendant rail carriers who were served and answered, and against no one else" is to ignore completely the substance of the Commission's action. That would hold, in effect, that the persons who must bear the cost of freight rate increases are not "subject thereto." Appellants submit that is factually, and legally incorrect. The Commission actually exercised its rule-making powers *to prescribe rates and tariffs*. The Commission's implementation of its rule making, through an order directed to the carriers, does not change the substance of its action.

In this case, the appellees do not maintain that *all* shippers, or *any* consignees and consumers, were personally served or had actual notice. The record affirmatively shows that important consignee-consumer interests were *not* personally served and did *not* have actual notice. The "Commission itself" could not represent such interests, as the District Court stated, even if representation by the Commission could be held a substitute for the public notice which Congress has prescribed in Section 4(a) of the Administrative Procedure Act (and it could not be so considered in the absence of Congressional authority). The Commission necessarily decides a rate case, as this case, upon the record as made in the hearings before it. Consumers and consignees have a right to be heard before the Commission, and the Commission is required by law to consider the effect of its action upon them. And consumer and consignee interests could no more be represented by the Commission itself than could the interests of shippers and carriers which the Commission is also required by law to consider (49 U. S. C. 15(a)(2)).

In many rate cases arising pursuant to complaint, the complainant and the carriers may be only nominal adverse parties. If the general public were denied notice of rate-making proceedings arising pursuant to complaints, friendly complaints against "defendant" carriers could lead to unwarranted and unjustified rate increases upon records reflecting only evidence essentially favorable to carrier interests. A reversal of the District Court's action is required to prevent such possible miscarriages of justice.

The question here presented has not been ruled upon, to the best of appellants' knowledge, except by the District Court in this case. The question is of vital importance in that, if the District Court's ruling should stand, those most directly affected by the Commission's rate-making powers, *the persons who pay the freight*, would be denied general public notice of rate-making proceedings before the Commission. Appellants respectfully submit that this Court's intercession is necessary to insure the notice which Congress intended and is a matter of substantial importance to the public.

It is important for shippers, consumers and consignees to know whether they may rely upon the Federal Register to receive notice of rate-making proceedings affecting their interests, or whether they must adopt other indirect, and unofficial, methods of determining when their interests are affected.

The question is also important in that a reversal of the District Court's decision will set aside the previous action of the Commission and will require further hearings, with general public notice in the Federal Register, at which all interested persons will have the Congressionally-prescribed opportunity to appear, be represented, and present their interests.

It is important for administrative agencies to know their obligations under the Administrative Procedure Act. The question here presented is a constantly recurring matter in Interstate Commerce Commission and other adminis-

trative proceedings. There is presently no uniformity of interpretation of Section 4(a) of the Administrative Procedure Act by the many administrative agencies exercising powers similar to that exercised by the Commission in this case. The matter is a substantial question of procedure which requires plenary consideration by this Court, with briefs on the merits and oral argument, for its resolution.

The Case Is Not Moot

Appellees may urge that this case is moot, and this section of this statement is anticipatory in the interests of expedition.

There was another appeal (other than appellants') of the Commission's order in this matter by the State Corporation Commission of Kansas (*State Corporation Commission of Kansas* v. *U. S.*, Civil Action T-854, U. S. District Court, District of Kansas, decided July 29, 1954), the decision in that case being unreported. In that case, the Kansas District Court found that the ultimate action of the Commission, in particulars not here material, was not properly supported by the Commission's findings and conclusions and ordered that the case be "remanded to the Commission for its further consideration."

Subsequently, on November 1, 1954, the Commission entered an order in Docket No. 29777, stating as follows:

> "Upon consideration of the record in the above-entitled proceeding, and for good cause appearing:
>
> "IT IS ORDERED, That, upon the Commission's own motion, this proceeding be, and it is hereby, reopened for further hearing.
>
> "IT IS FURTHER ORDERED, That this proceeding be, and it is hereby assigned for further hearing December 14, 1954, 9:30 o'clock a.m., United States Standard Time, at the Jung Hotel, New Orleans, La., before Examiners George J. Hall and Edward L. Boisseree."

Later, on November 8, 1954, the Commission entered a notice of the further hearings in which it stated:

> "The separate records, to the extent followed in the prior hearings, will be observed in the further hearings. In their further presentations, the parties will be expected to avoid repetitious and irrelevant testimony, observing to the fullest possible extent the presentations and evidence submitted by them in the present records."

The Commission did not publish notice of the further hearings in the Federal Register.

The further hearings were convened in New Orleans on December 14, 1954, some further evidence was taken at that time, and further hearings were postponed to a time and place later to be determined.

The question of proper notice pursuant to Section 4(a) of the Administrative Procedure Act continues to be a vital question, however, in this proceeding for at least two reasons:

(a) In case the Commission should conclude its further hearings and enter a new order prescribing changed rates and tariffs, that order would be subject to attack on the same ground (failure to publish notice) which is here presented.

(b) Further, although appellants are now active participants in the further hearings, the Commission's notice of hearing, above quoted, indicates that it will observe the record in the prior hearings in its further determinations. Since the prior hearings were conducted without publication of notice in the Federal Register, and since appellants were not participants in the prior hearings, the record in the prior hearings could not properly be used by the Commission as a basis for its further determinations in this matter unless appellants were afforded full opportunity for cross-examination and rebuttal presentation in the reopened proceedings, or unless the prior hearings were law-

fully conducted despite the Commission's failure to publish notice in the Federal Register. Appellants have, in the further hearings, demanded that all previous witnesses be made available for cross-examination, upon appellants' request, with respect to the testimony and exhibits presented by such witnesses. No party to the proceeding would, however, agree to make such witnesses available upon the further hearings. And only this Court can determine whether the record in the previous proceeding was lawfully made in view of the Commission's failure to publish notice in the Federal Register. Thus, decision by this Court is necessary to determine whether the Commission may lawfully rely upon the old record, made in the prior proceedings, in its further consideration of this matter.

Finally, it should be remembered that the matter here involved is one of public interest, the action complained of is one capable of repetition and is likely to recur, and has in fact recurred in the instant proceeding, and is also a case where it is desirable in the public interest to determine the question involved in order to provide a guide to the public officials involved for action in future cases. In such a case numerous authorities may be cited for the proposition that the courts will not dismiss the proceeding as "moot." A few of such authorities are: *United States* v. *Freight Assn.*, 166 U. S. 290, 307-310 (1897); *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, 452 (1911); *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 514-516 (1911); *McGrain* v. *Daugherty*, 273 U. S. 135, 180-182 (1927); *Leonard* v. *Earle*, 279 U. S. 392, 398 (1929); *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 58 (1938); *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257 (1938); *Ford Motor Co.* v. *United States*, 335 U. S. 303, 313 (1948); *Papaliolios* v. *Durning*, 175 F. (2d) 73, 75 (C. C. A. 2d, 1949); *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 385, 112 F. (2d) 192, 195 (1940), *cert. denied*, 310 U. S. 647 (1940); *Boise City Irr. & Land Co.*

v. *Clark*, 131 Fed. 415, 419 (C. C. A. 9th, 1904); *Walling* v. *Haile Gold Mines*, 136 F. (2d) 102, 105 (C. C. A. 4th, 1943); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 335 (C. C. A. 8th, 1944); *Howard* v. *Wilbur*, 166 F. (2d) 884, 885 (C. C. A. 6th, 1948); *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. 994, 995 (C. C. E. D. La., 1893), *aff'd*, 57 Fed. 85 (C. C. A. 5th, 1893); *United States* v. *Railway Employes' Dept.*, 286 Fed. 228 (N. D. Ill. 1923).

In the court below, appellants urged other objections to the Commission's decision and order, particularly with respect to the failure of the Commission to make legally required findings and some other procedural matters not here pressed on this appeal. Appellants believe that the other errors in the Commission's decision urged by them can be cured by the Commission upon its further consideration in the reopened proceedings. The error of the Commission in its failure to publish notice in the Federal Register cannot be so cured, however particularly in view of the Commission's failure to publish notice of the further hearings in the Federal Register and its determination to rely upon the record in the prior hearings in its further consideration of the case.

CONCLUSION

The question involved is substantial and important to shippers, consumers and consignees throughout the country. It affects all the many Federal administrative agencies which have rate-making powers. It ought to be resolved only after plenary consideration by this Court. Appellants urge this Court to note probable jurisdiction and to set this case down for argument.

Respectfully submitted,

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Dated: Atlanta, Georgia,
January 3, 1955.

APPENDIX

The Opinions Below

Opinion of the United States District Court, Northern District of Georgia, Atlanta Division

No. 4826

CIVIL ACTION

SOUTHERN BAKERS ASSOCIATION, INC., *et al.*

—v.—

UNITED STATES OF AMERICA, *et al.*

Before RIVES, *Circuit Judge*, and HOOPER and SLOAN, *District Judges*.

SLOAN, *District Judge*:

The order of the Interstate Commerce Commission which petitioners here seek to have set aside, was entered by the Commission as a result of an investigation instituted by reason of the filing of a complaint which was assigned ICC Docket No. 29777. This complaint was construed and treated by the Interstate Commerce Commission (hereinafter called "Commission") as a request for further consideration of certain major issues which had been previously disposed of in two general proceedings concerning carload freight rates on grain and grain products.

In 1925, in response to the Hoch-Smith Resolution,[1] the Commission instituted a general investigation of grain rates throughout most of the United States. The first proceeding, known as the "Grain Case" [2] after having been

1 U. S. Code, Title 49, Sec. 55.

2 205 ICC 301.

reopened by the Commission in response to the Mandate of the Supreme Court,[3] was, by a supplemental report of October, 1934,[4] made effective July 1, 1935 and that report concerned the rates on these commodities throughout the Western District, described in the report as the territory west of the Great Lakes and on the West of the Mississippi River (including eastbank points), Illinois and the upper peninsula of Michigan. A general readjustment of the rates was accomplished by the prescription of rate-break combinations of flat rates to the principal markets (including Omaha, Neb., Kansas City, Mo., Minneapolis and Duluth, Minnesota) and proportional rates therefrom to final markets and gateways (including Chicago, Ill., St. Louis, Mo., and Memphis, Tenn.).

The record [sic—probably should be "second"] of these proceedings was entitled "Grain to, From and Within Southern Territory" and is called the "Southern Case."[5] That proceeding concerned rates within the South and from other territories to the South. The prior general adjustment of rate break combinations was therein extended into the South by combinations on Memphis, St. Louis and other river gateways.

Complaint No. 29777:

That complaint was filed by the State Corporation Commission of Kansas on behalf of the grain producers, dealers and processors of that State. The complaint alleged that railroad freight rates on grain and grain products in carload lots from origins in Oklahoma and Texas were unduly preferential to producers and shippers in Oklahoma and Texas (on the north of the main line of the Texas and Pacific Railway from El Paso to Texarkana, Texas through Fort Worth and Marshall) in violation of Sec. 3 of the Act

3 *A. T. & Santa Fe Ry.* v. *U. S.*, 284 U. S. 248.

4 215 ICC 83.

5 239 ICC 629.

[49 U. S. C. A. §3]. The complaint attacked as unreasonable and preferential the proportional rates from Oklahoma and North Texas to Memphis, Tennessee as components of through combinations rates to the South. Named as defendants in this complaint were the Atchison, Topeka and Santa Fe Railway Company, and other railroads.

The complaint does not allege that the Oklahoma and Texas rates are too low, nor does the complaint ask that these rates be increased. The complaint alleges that the Kansas rates as compared to the Texas and Oklahoma rates are preferential to Texas and Oklahoma and prejudicial to Kansas, and the complaint merely prays that the Commission prescribe such other rates in lieu of the rates complained of as the "Commission may deem reasonable."

The Commission's decision in that proceeding found that the existing rate structure was unreasonable and unduly preferred Southern Kansas, Oklahoma and Texas and unduly prejudiced Northern Kansas and other areas. The Commission's order required western railroads to increase freight rates on grain and grain products from origin points in South Kansas, Oklahoma and North Texas to points in the South. This increase in freight rates the Commission found would effectively remove the preferences and prejudices which the Commission found to exist.

Although the Commission's decision in that proceeding is dated June 5, 1953, and the rates prescribed were to become effective on October 22, 1953, the effective date has been extended until September 1, 1954.

The complaint here:

Petitioners here, the Southern Bakers Association, Inc., and the Atlanta Baking Company, Inc., seek a review of the orders of the Commission, Interlocutory Injunction, and Temporary Restraining Order.

Alleging a direct, substantial and vital interest in the proceeding, petitioners assert that as consumers and consignees they are legally entitled to have freight rates prescribed by the Commission in a legal manner.

Interventions, as plaintiffs, by the Corporation Commission of the State of Oklahoma, Enid Board of Trade and Oklahoma Millers Association have been allowed and the Court will give consideration to the questions made in the complaint and interventions.

In determining the questions here this Court must and does recognize the "rule of administrative finality" governing judicial review of Commission decisions.

The Court here confines itself to the ultimate questions as to whether the Commission acted within its power, and whether the order is based upon adequate findings which in turn are supported by substantial evidence. The findings of the Commission are made by law prima facie true . . . the Court in any case will not examine the facts further than to determine whether there was substantial evidence to sustain the order.[6] However, in this case the complainants herein having determined not to introduce into evidence the transcript of the evidence before the Interstate Commerce Commission, this Court will not consider the question as to the sufficiency of the evidence raised by the complaint but will treat the findings of the Commission as being properly supported by evidence.[7] Eliminating the questions which depend upon the sufficiency of the evidence, the questions remaining to be determined by the Court are:

1. Did the Commission make adequate subsidiary findings to support the ultimate findings?
2. Did the Commission observe the statutory requirements of Sec. 15 (a) (2) of the Act in prescribing the higher rates?
3. Was the Commission required to publish notice of the proceeding in the Federal Register as required

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6 *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 549.

7 *Mississippi Valley Barge Co.* v. *U. S.*, 292 U. S. 282, 287.

by Sec. 4 (a) of the Administrative Procedure Act [5 U. S. C. Sec. 1003 (a)]?

In seeking a determination of these questions the Court is mindful of the fact that rate making problems are complicated and involve the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated.[8]

"The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the positive, dynamic character of transportation problems."[9]

In the proceeding before it the Commission had first to decide whether the existing rates were unreasonable, unduly preferential and prejudicial.

The Commission found the existing rates to be unreasonable, unduly preferential to Southern Kansas, Oklahoma and Texas and to the prejudice of Northern Kansas, Nebraska and other named states, to the extent that they failed to conform to the flat rates from those states to Memphis.

Having found the existing rates to be unreasonable, unduly preferential and prejudicial, the Commission was required to determine what rates should be prescribed to remove the prejudices and preferences. Determining this question, the Commission found that the proportional rates lower than the flat rates from Southern Kansas, Oklahoma and Texas to Memphis, should be cancelled.

This cancellation made effective the rates complained of here.

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8 *New York* v. *United States*, 331 U. S. 284, 335.

9 *Board of Trade* v. *U. S.*, 314 U. S. 534, 546.

The Commission considered that the existing rates of the defendant carriers were the lowest possible lawful rates and found this to be sustained and corroborated by the findings of the Commission in the "Grain Case" (205 ICC 301) and the "Southern Case" (259 ICC 629) wherein the Commission determined that the rates fixed were in full compliance with the requirement of the Hoch-Smith Resolution (49 U. S. C., Sec. 55) to the effect that the lowest possible lawful rate on agricultural products be prescribed.

The Commission found that any decrease in existing rates from the Northern Kansas level would result in an unwarranted reduction of the revenues of the carriers and would result in a general disruption of the prescribed rate levels.

Plaintiffs complain that the Commission failed to make essential findings of fact that would support its order and failed to make subsidiary or subordinate findings supporting the conclusions of the Commission.

As we have pointed out, the Commission had two ultimate questions before it:

1. Were the existing rates unreasonable and unduly preferential and prejudicial?

2. What rates should be prescribed in lieu of the existing rates?

The report of the Commission, in narrative form, which is approved by our courts,[10] disclosed many subsidiary findings, among which are two such findings which the Commission, in part at least, found as reasons for its determination:

1. Removal of undue preferences and prejudices by reduction of rates rather than by an increase, would result in unwarranted reduction in carrier revenues, and

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10 *Alabama Great Southern Ry. Co.* v. *U. S.*, 340 U. S. 216, 227-228.

2. Would result in a general disruption of prescribed rate levels and relations.

These findings are themselves subsidiary findings and constitute an adequate basis and statement of reasons and fully meet the requirements of Sec. 8 of the Administrative Procedure Act (5 U. S. C., Sec. 1007).

There is nothing before us to indicate that the Commission did not observe the statutory requirement of Sec. 15 (a) (2) of the Act in prescribing the higher rates. The presumption is that, in the performance of its duty, the Commission observed those requirements.

Plaintiffs complain that they had no notice of the proceedings before the Commission; that the Commission failed to give adequate notice even to those who were parties to the case. Plaintiffs insist that Secs. 4 (a) and 4 (b) of the Administrative Procedure Act require the publication of notice in the Federal Register which was not done.

This proceeding was begun with the filing of a complaint under Sec. 13 (2) of the Act by the State Corporation Commission of Kansas which named as defendants the rail carriers whose rates were alleged to be unjust and unreasonable in violation of Sec. 3 of the Act, and said complaint further alleged that said rates as compared to rates to the same destination from origins in Oklahoma and Texas are unduly prejudicial to producers and shippers in Kansas and unduly preferential to producers and shippers in Oklahoma and Texas.

So far as the record discloses, the carriers were served and filed answers. The matter was referred to examiners who held hearings; filed a Report; Exceptions and Briefs were filed, argument had, and the case submitted to the Commission for decision.

From the date of the filing of the complaint on June 26, 1947 to June 5, 1953, the date of the Commission's decision—a six year period—many interventions were filed.

Between July 15, 1947 and June 4, 1951, petitions for leave to intervene in Docket No. 29,777 were filed by Board of Trade of Kansas City, Missouri; Merchants Exchange of St. Louis, Missouri; The Texas Industrial Traffic League; Pillsbury Mills, Inc.; Fort Worth Grain and Cotton Exchange; Indianapolis Board of Trade, Inc.; Acme-Evans Co., Inc.; Omaha Grain Exchange; Nebraska State Railway Commission; Board of Trade of the City of Chicago; State Corporation Commission of the State of Kansas; Kansas-Missouri River Mills; New Orleans Traffic and Transportation Bureau; The Hutchinson Board of Trade, Hutchinson, Kansas, and Russell-Miller Milling Company.

Subsequent to the decision of the Commission of July 5, 1953, and during the month of September, 1953, interventions were filed by Southern Bakers Association, Inc., North Carolina Utilities Commission and North Carolina Bakers Council, Inc.

Under the facts in this case, where the relief sought by the complaint was an order directed against the defendant rail carriers who were served and answered, and against no one else, Sec. 4 (a) of the Administrative Procedure Act does not require the publication of notice, since this proceeding comes within the exception to the provision.[11] Consignees and consumers are not directly subject to the order, and in its indirect effect upon them, their interests were sufficiently represented by the Commission itself, a public agency created by Congress.

The Commission was not required to state grounds for the denial of plaintiffs' petition for rehearing, and reargument, this matter resting within the discretion of the Commission.[12]

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11 Sec. 4 (a). "*Notice.* General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law . . ."

12 *Carolina Scenic Coach Lines* v. *United States*, 59 F. Supp. 336.

The orders which plaintiffs attack were entered after hearing and rehearing, and upon consideration and evaluation of the evidence introduced upon the hearings. The findings of fact relate to complex rate problems. That the findings are supported by substantial evidence cannot be questioned here, and this Court will not interfere.

The other grounds of objection urged by plaintiffs have been considered but do not require a different result.

The order and findings of the Commission, here attacked, are sustained and this action dismissed.

This the 16th day of August, 1954.

RICHARD T. RIVES
United States Circuit Judge

FRANK A. HOOPER
Chief Judge, United States District Court, Northern District of Georgia

BOYD SLOAN
United States District Judge, Northern District of Georgia

Order of District Court Denying Appellants' Petition for Rehearing and Motion to Alter and Amend Judgment

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

No. 4826

CIVIL ACTION

SOUTHERN BAKERS ASSOCIATION, INC. and
ATLANTA BAKING COMPANY, INC.

—v.—

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION

Before RIVES, *Circuit Judge*, and HOOPER and SLOAN, *District Judges*.

SLOAN, *District Judge*:

After due consideration, the petition for rehearing and motion to alter and amend judgment filed by Southern Bakers Association, Inc., and Atlanta Baking Company, Inc., is denied.

This the 7th day of September, 1954.

RICHARD T. RIVES
United States Circuit Judge

FRANK A. HOOPER
Chief Judge, United States District Court, Northern District of Georgia

BOYD SLOAN
United States District Judge, Northern District of Georgia

FILED IN CLERK'S OFFICE
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 508

SOUTHERN BAKERS ASSOCIATION, INC., AND ATLANTA BAKING COMPANY, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

SUGGESTION OF MOOTNESS

This is a direct appeal from a final judgment entered on August 16, 1954, by a three-judge district court (N. D. Ga.) convened pursuant to 28 U. S. C. 2284, 2325. The judgment dismissed a complaint which sought to set aside an order of the Interstate Commerce Commission, entered June 5, 1953. The Commission order required western railroads to increase freight rates on grain and grain products from origin points in southern Kansas, Oklahoma and northern Texas to points in the South.

There is no dispute on the facts. On June 26, 1947, the Kansas Corporation Commission filed a complaint with the Interstate Commerce Commission charging, *inter alia,* that grain rates to the South from Wichita and Beloit, Kansas, were unreasonable and unduly prejudicial to the extent that they exceeded the rates from Enid, Oklahoma. After full administrative hearings, the Commission found that the rates were unreasonable and unduly preferential to southern Kansas, Oklahoma, and northern Texas, and unduly prejudicial to northern Kansas. The Commission ordered increases which reduced but did not remove the disparity in the freight rates. *Kansas State Corp. Comm.* v. *Atchison, T. & S. F. Ry. Co.,* 289 I. C. C. 553, 557.

On appellants' petition to review the Commission order, the district court rendered a unanimous opinion sustaining the order. The court held that the order was based on adequate findings supported by substantial evidence and that Section 4 (a) of the Administrative Procedure Act did not require publication of notice of the hearings in the Federal Register (Juris. Statement 13–21).

The Kansas State Commission, the original complainant before the Interstate Commerce Commission, instituted in another district court (D. Kan.) a proceeding to review the order attacked in the instant case. In that proceeding the district court unanimously rendered an opinion on

July 29, 1954, holding that the findings of the Interstate Commerce Commission were insufficient to support its order (*Kansas State Corporation Commission* v. *United States,* U. S. D. C. D. Kan., Civil Action T–854, not reported). Judgment setting aside the Commission's order and remanding the case for further proceedings was entered on August 19, 1954, and no appeal was taken from this judgment. Subsequently the Commission issued an order reopening the proceedings, a pre-hearing conference was held on December 16, 1954, and further proceedings were postponed to a later date.

We submit that the judgment entered by the Kansas district court renders the instant case moot. This judgment grants the very relief sought by the present appellants; it sets aside, in its entirety, the Commission's order. This order, being no longer in effect, cannot adversely affect appellants' legal rights. This Court has consistently held that a cause becomes moot when subsequent events end the controversy. *St. Pierre* v. *United States,* 319 U. S. 41; *Mills* v. *Green,* 159 U. S. 651. See also *United States* v. *Alaska Steamship Co.,* 253 U. S. 113; *McGrath* v. *Nat. Assn. of Mfgrs,* 344 U. S. 804.

It is not possible now to predict the nature of the order which will eventuate from the reopened proceeding, or whether, on its conclusion, there will be any basis for the claim of procedural error asserted on the instant appeal. In the

further hearings appellants will be free to present evidence, call witnesses, and otherwise fully participate in the proceedings. While they contend that the Commission may not properly rely upon the prior record unless appellants are "afforded full opportunity for cross-examination and rebuttal presentation" (Juris. Statement 9), the record of the pre-hearing conference of December 16, 1954, in which appellants participated, indicates that such opportunity will be afforded them. But in any event, the mere possibility of error in the further progress of the cause furnishes no foundation for the appeal now taken. The simple fact is that at this point there is no outstanding or effective order before the Court for review.

While there is accordingly no present basis for reaching the merits of the question which appellants seek to raise, we nonetheless point out, additionally, that this question is not a substantial one.

Appellants' sole contention is that the Commission's order is invalid because of failure to publish notice of the proceeding in the Federal Register (Juris. Statement 4–8). The alleged requirement of publication is based on Section 4 (a) of the Administrative Procedure Act (5 U. S. C. 1003 (a)), which provides:

> Notice. General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto

> are named and either personally served or otherwise have actual notice thereof in accordance with law) * * *.

This proceeding clearly falls within the above parenthetical exception. The complaint filed by the Kansas Corporation Commission charged that certain rates of certain named railroads were unlawful under Sections 1 and 3 of the Interstate Commerce Act. Relief was sought only against these railroads, and these railroads were duly served and answered the complaint. Accordingly, all persons "subject" to the proposed rule making were "named" and "personally served".

The district court held that while consignees and consumers may be indirectly affected by a rate order of the kind sought in the Commission proceeding, they are not "subject" to it within the meaning of Section 4 (a) (Juris. Statement 20). The legislative history of the section supports this interpretation. The House Judiciary Committee report on the bill explained that it had added the parenthetical exception to the Senate bill because there "is no reason to burden the Federal Register with notices addressed to particular parties who have been personally served or otherwise have notice" (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 285). The Attorney General's Manual on the Administrative Procedure Act, speaking of the parenthetical exception, states (p. 28):

> The reason for the quoted exception is to avoid burdening the Federal Register with notices addressed to particular parties who have been personally served or otherwise have notice. * * * For example, where a proceeding is commenced to establish rates for named carriers or utilities, if a notice complying with section 4 (a) is personally served upon such persons, publication in the Federal Register is not required by the subsection.

CONCLUSION

The cause having become moot, this Court should remand the case to the district court with directions to vacate the judgment and to dismiss the petition for review as moot.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

EDWARD M. REIDY,
General Counsel,
Interstate Commerce Commission.

JANUARY, 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954
No. 508

SOUTHERN BAKERS ASSOCIATION, INC., and
ATLANTA BAKING COMPANY, INC.,
Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

PETITION FOR REHEARING ON BEHALF OF APPELLANTS

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and
THEODORE M. FORBES, JR.,
of Atlanta, Georgia,
Of Counsel.

Dated: March 10, 1955.

IN THE

Supreme Court of the United States

October Term, 1954

No. 508

SOUTHERN BAKERS ASSOCIATION, INC., and
ATLANTA BAKING COMPANY, INC.,

Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

PETITION FOR REHEARING ON BEHALF OF APPELLANTS

Appellants come now, within the time provided by Rule 58 of the Supreme Court Rules, and move that this Court grant a rehearing in the above-styled case, and upon such rehearing vacate the order rendered February 14, 1955 and enter an order noting probable jurisdiction and setting this case down for argument upon the merits.

Preliminary Statement

After the filing of appellants' Statement as to Jurisdiction, appellees filed a "Suggestion of Mootness" which appellants treated as a motion to dismiss under Rule 16(1) of the rules of this Court. Appellants therefore prepared

for filing a brief in opposition pursuant to Rule 16(3) but found when that brief was duly presented for filing on February 15, 1955 that this Court, on February 14, 1955, had entered its order dismissing the petition for review upon the ground that the case was moot.

Appellants' Brief in Opposition to Motion to Dismiss Appeal, bearing the date of February 14, 1955, is attached hereto and made a part hereof.

Grounds for This Petition for Rehearing

This petition for rehearing is based upon the following grounds:

a. The Court's order of February 14, 1955 overlooks many decisions of this and other courts which establish that this case is not moot;

b. The Court's aforesaid order misconstrues the decision of the United States District Court for the District of Kansas; and

c. The aforesaid order may be based upon statements of appellees which were not entirely correct.

The aforesaid grounds are developed in the attached Brief of Appellants in Opposition to Motion to Dismiss Appeal to which the Court is respectfully referred.

Certificate of Counsel

Counsel for appellants hereby certifies that this petition for rehearing is presented in good faith and not for delay.

CONCLUSION

It is respectfully submitted for the reasons set out herein, in the attached Brief of Appellants in Opposition to Motion to Dismiss Appeal, and in appellants' Statement as to Jurisdiction, pages 8-11, that the case is not "moot" and should be decided by this Court. Appellants therefore urge this Court to vacate its order of February 14, 1955, to note probable jurisdiction and to set this case down for argument.

Respectfully submitted,

/s/ HAROLD L. RUSSELL,
of Atlanta, Georgia,
Attorney for Appellants.

GAMBRELL, HARLAN, BARWICK, RUSSELL & SMITH,
ROBERT R. RICHARDSON,
and
THEODORE M. FORBES, JR.,
of Atlanta, Georgia,
Of Counsel.

Dated: Atlanta, Georgia,
March 10, 1955.

MAR 10 1955
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

October Term, 1954
No. 508

SOUTHERN BAKERS ASSOCIATION, INC., and
ATLANTA BAKING COMPANY, INC.,
Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Of Counsel.

Dated: February 14, 1955.

In the

Supreme Court of the United States

October Term, 1954

No. 508

Southern Bakers Association, Inc., and
Atlanta Baking Company, Inc.,

Appellants,

—v.—

United States of America and Interstate
Commerce Commission,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellees in this action have filed a "Suggestion of Mootness" asking this Court to refuse to consider this case and to remand it to the district court. Appellees argue that the question presented is now moot and that it is not substantial. Inasmuch as appellees' "Suggestion of Mootness" is effectively a motion to dismiss under Rule 16(1) of the Rules of this Court, this brief is being filed in opposition thereto pursuant to Rule 16(3).

Appellants' Statement as to Jurisdiction anticipated much of appellees' arguments and this brief will supplement that Statement.

IN THE

Supreme Court of the United States

October Term, 1954

No. 508

SOUTHERN BAKERS ASSOCIATION, INC., and
ATLANTA BAKING COMPANY, INC.,

Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellees in this action have filed a "Suggestion of Mootness" asking this Court to refuse to consider this case and to remand it to the district court. Appellees argue that the question presented is now moot and that it is not substantial. Inasmuch as appellees' "Suggestion of Mootness" is effectively a motion to dismiss under Rule 16(1) of the Rules of this Court, this brief is being filed in opposition thereto pursuant to Rule 16(3).

Appellants' Statement as to Jurisdiction anticipated much of appellees' arguments and this brief will supplement that Statement.

The Case Is Not Moot

The decision of the United States District Court for the District of Kansas in *Kansas State Corporation Commission* v. *United States,* Civil Action T-854 (July 29, 1954; not reported), did set aside the Interstate Commerce Commission order here attacked but the Kansas Court remanded the proceeding to the "Commission for its further consideration." The Kansas decision did not grant the relief sought by appellants herein.

The import of that decision was that the increased rates complained of by appellants here were not increased sufficiently by the Commission to conform to the Commission's findings of preference and prejudice. Thus "further consideration" by the Commission threatens appellants with even greater injury than that which prompted the appeal in the instant case.

Most importantly, the Kansas decision does not dispose of appellants' contention here which is that the proceedings before the Commission were absolutely null and void because of the Commission's failure to publish the notice which appellants claim is required by Section 4(a) of the Administrative Procedure Act. And "further consideration" (in accordance with the Kansas decision) by the Commission of a proceeding which is a nullity could, insofar as appellants are concerned, only lead to a compounding of the illegality. The null and void proceedings before the Commission must, according to appellants' view, be completely set aside, and not considered further.

Of course, as appellees state, "a cause becomes moot when subsequent events end the controversy." But here, appellants' controversy continues and the threat to appellants' interest is unabated. Appellees have also overlooked the principle that a question involving the public interest which is capable of repetition and is likely to recur will

be decided by this Court to provide a guide for action by public officials in future cases irrespective of considerations of "mootness" (see authorities cited in Jurisdictional Statement 10-11). The authorities cited by appellees are not applicable here and are readily distinguishable from the present situation. Furthermore, examination of those cases shows this Court recognizes that the type of question here involved does not become "moot" even though the immediate controversy may have ended. In *St. Pierre* v. *United States*, 319 U. S. 41, 63 S. Ct. 910 (1943), a case cited by appellees, this Court expressly stated that case was different from the case of *Southern Pacific Terminal Corporation* v. *Interstate Commerce Commission*, 219 U. S. 498, 31 S. Ct. 279 (1911), relied upon by appellants. The controversy here has not ended—but even if it had, the question presented is one which should be determined by this Court.

Appellees claim that it is not possible now to predict the nature of the order which will eventuate from the reopened proceeding before the Commission, or whether, on its conclusion, there will be any basis for the claim of procedural error asserted on the instant appeal. The Commission has already embarked upon further hearings but notice was not published in the Federal Register. The very same ground of procedural error which appellants assert here may later be asserted as invalidating any order which will result from the reopened proceeding. However, that is immaterial because appellants contend that the prior record is null and void for lack of notice. No order based either in whole or in part on that record could be valid, even as against appellants, until the required notice were given and appellants received opportunity for full cross-examination and rebuttal presentation with respect to that record. Furthermore, irrespective of notice to appellants and appellants' opportunities for cross-examination and rebuttal with respect to the prior record, lack of legally-

required notice may be a jurisdictional defect which would invalidate the entire proceeding irrespective of actual notice to any particular party.

Appellees also state that the record of the prehearing conference of the reopened proceeding before the Commission indicates that appellants will be afforded full opportunity for cross-examination and rebuttal presentation with respect to the prior record. Actually, the record of the prehearing conference shows that the parties to the original proceeding would not agree to produce for cross-examination the witnesses who presented evidence in the prior record, as shown by pages 1052-1053 of the record of that conference.

In any event, the Commission could not by grafting any amount of patchwork on the prior null and void record cure its failure to publish the notice which appellants maintain was required by the Administrative Procedure Act. Unless this Court acts on this appeal, the Commission will compound its previous legal error. The action complained of is capable of repetition and has, in fact, already recurred. This Court's decision is necessary as a guide to public officials in future cases. Under these circumstances the case should not be dismissed as moot (authorities cited in Jurisdictional Statement 10-11).

The Question Presented Is Substantial

Appellants' statement as to jurisdiction effectively refutes the argument of appellees that the question presented is not substantial.

The question is whether or not the general public, the people who pay rates and charges, will be given notice of rate-making proceedings. That question, on its face, is a question of grave public importance.

This Court's resolution of that question will also have widespread effect upon the procedural practices of all administrative bodies.

The answer to the question must be found in Section 4(a) of the Administrative Procedure Act, which has not previously been interpreted by this Court or any court other than the district court in this proceeding. The courts of this country have been quick to find that failure to give notice of proposed legislative, or administrative, action, as required by Federal or State law, or constitutions, renders any action taken null and void.

Appellants' standing to bring this suit has not been questioned. It is absurd to maintain that appellants are not subject to the rate-making orders of the Commission and that, therefore, the exception to Section 4(a) of the Administrative Procedure Act applies. No persons could be more directly subject to a rate-making order than the persons who pay the freight, and those persons are the shippers, consignees, consumers and general public who were not personally served and who are not claimed to have had actual notice of the proceeding before the Commission.

It is not necessary to burden this brief with a recitation of the notices which the Commission has actually published in the Federal Register with respect to other rate proceedings. Examination of the Register will show frequent notices published by the Commission in rate proceedings. Quite obviously, some direction by this Court is required to assure uniformity in practice, both by the Commission itself and by other administrative agencies.

If the general public, shippers, consumers and consignees are to be denied, through the interpretation of the Administrative Procedure Act insisted upon by appellees, general public notice of rate-making proceedings which directly and vitally affect them, this Court should so rule. It is too important a matter to be finally determined by failure of this Court to review a district court decision. On the other hand, if the Administrative Procedure Act is to be interpreted as appellants maintain it should be, and so as

to insure to the general public, shippers, consumers and consignees, public notice of rate-making proceedings which directly and vitally affect them, this Court should so rule, so that administrative agencies charged with conducting their proceedings in accordance with the requirements of the Administrative Procedure Act will abide by the requirements of that Act.

CONCLUSION

The case is not moot, the grounds which prompted appellees "Suggestion of Mootness" being without merit. The case presents a substantial question of procedure which requires plenary consideration by this Court, with briefs on the merits and oral argument, for its resolution. Appellants urge this Court to deny appellees' motion to dismiss, to note probable jurisdiction and to set this case down for argument.

Respectfully submitted,

HAROLD L. RUSSELL,
of Atlanta, Georgia,
Attorney for Appellant.

GAMBRELL, HARLAN, BARWICK, RUSSELL & SMITH,
ROBERT R. RICHARDSON,
and
THEODORE M. FORBES, JR.,
of Atlanta, Georgia,
Of Counsel.

Dated: Atlanta, Georgia,
February 14, 1955.

No. 508. SOUTHERN BAKERS ASSOCIATION, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Georgia. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court with directions to dismiss the petition for review upon the ground that the cause is moot. *Harold L. Russell* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 124 F. Supp. 600.